

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION**

TREVER CHASE CANNON,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. _____
)	
ROBERT J. ROBINSON, in his individual)	
capacity and in his official capacity as an)	
employee of the Savannah Police Department,)	
and THE MAYOR AND ALDERMEN)	
OF THE CITY OF SAVANNAH,)	
)	
Defendants.)	

COMPLAINT

COMES NOW Trever Chase Cannon, Plaintiff in the above-styled action, and files this his Complaint against Defendants Robert J. Robinson, in his individual capacity and in his official capacity as an employee of the Savannah Police Department, and The Mayor and Aldermen of the City of Savannah, showing the following:

I. PARTIES, JURISDICTION AND VENUE

1. Plaintiff Trever Chase Cannon is a citizen and resident of Georgia.
2. Defendant Robert J. Robinson is a citizen and resident of Chatham County, Georgia and may be served with process at 201 Habersham Street, Savannah, Chatham County, Georgia 31401. Defendant Robinson is being sued in both his official capacity and in his individual capacity.

3. Defendant The Mayor and Alderman of the City of Savannah (“City of Savannah”) is a municipal entity located in Chatham County, Georgia. Process may be served upon the City of Savannah through its mayor of, Eddie DeLoach, located at 2 East Bay Street, Savannah, Chatham County, Georgia 31401.

4. Plaintiff brings this action pursuant to 42 U.S.C. § 1983 for violations of his rights under the United States Constitutional, including the Fourth, Fifth and/or Fourteenth Amendments.

5. The jurisdiction of this Court is invoked pursuant to 42 U.S.C. § 1983, 28 U.S.C. §§ 1331, 1343(3) and (4), and the Fourth, Fifth, and/or Fourteenth Amendments to the United States Constitution.

6. Venue is proper in the Southern District of Georgia pursuant to 28 U.S.C. § 1391(b) because a substantial part of the events or omissions giving rise to the claims occurred in Chatham County, Georgia in the Southern District of Georgia and because at least one defendant resides in the Southern District of Georgia. To the extent required by O.C.G.A. § 36-33-5, *ante litem* notice has been provided within six months of the accrual of the causes of action asserted herein. A copy of the notice is attached hereto as Exhibit “A”.

II. FACTUAL ALLEGATIONS

7. Plaintiff was involved in an automobile accident on February 22, 2013 on I-516 that resulted in two fatalities.

8. Following the accident, Plaintiff told investigators that he was unexpectedly cut-off by a vehicle that was improperly merging onto I-516 in front of him, causing him to swerve and lose control of his truck.

9. Within minutes after the accident, an eyewitness to the incident, Tom Shadle, was interviewed by Defendant Robert J. Robinson, formerly a detective with the Savannah-Chatham Metropolitan Police Department (“SCMPD”).

10. The interview with Mr. Shadle was recorded on video by Defendant Robinson.

11. During his interview with Defendant Robinson, Mr. Shadle stated, in relevant part, the following:

“I was going to the doctor’s office on Jackson Boulevard, I was coming off Veteran's Parkway going onto eastbound 516, coming down the merge lane to merge onto 516. Had one eye on the road ahead of me and one eye on the mirror to look for traffic that I was going to merge into. There was a vehicle ahead of me that seemed like to me they should have yielded to the traffic that was on 516 but they didn't they continued to merge onto 516. There was a pickup truck that I observed on 516, appeared that he swerved to avoid hitting that car and another vehicle that was in the inside lane on 516. That caused him to cross the median and I believe he rolled maybe multiple times . . .”

12. Mr. Shadle’s statements were entirely consistent with Plaintiff’s account of the accident.

13. However, in his official report, Defendant Robinson materially altered the statements made by Mr. Shadle. A copy of Defendant Robinson’s report is attached hereto as Exhibit “**B**”.

14. Specifically, in his report, Defendant Robinson summarized his interview with Mr. Shadle as follows:

“Detective R. Robinson did an audio/video interview with Mr. Tom Shadle. Mr. Shadle advised that he was exiting of (sic) Chatham Parkway onto I-516 and he was travelling eastbound on I-516, Mr. Shadle was behind the pickup truck and he advised that the pickup truck was travelling at a high rate of speed as traffic slowed down the pickup truck swerved from the outside lane into the inside lane he lost control struck the median flipped and went into the opposite lane of traffic and struck the SUV.”

15. Apart from placing Mr. Shadle on the wrong roadway, erroneously reporting that Mr. Shadle was traveling directly behind Plaintiff’s truck, and containing a fabricated statement that Mr. Shadle claimed to have observed Plaintiff “traveling at a high rate of speed,” Defendant Robinson’s falsified report critically failed to mention the other vehicle that was attempting to merge onto I-516 and that cut Plaintiff off.

16. The number and significance of the inaccuracies and omissions in Defendant Robinson’s summary of Mr. Shadle’s interview were not innocent or unintentional.

17. Based upon Defendant Robinson’s official report, the State of Georgia pursued criminal charges against Plaintiff for two counts each of 1st degree vehicular homicide, serious injury by vehicle, and reckless driving.

18. In order to win a conviction on these counts, the State had to prove that Plaintiff was driving in reckless disregard for the safety of persons or property, and not simply traveling over the speed limit. The State sought to show reckless disregard on behalf of Plaintiff by demonstrating that he was intentionally and dangerously weaving through traffic just prior to the accident.

19. When the recording of Defendants Robinson's interview with Mr. Shadle (along with nine other recordings of interviews of witnesses conducted by the police) were not furnished during the criminal proceedings, Plaintiff's defense attorney filed a motion to compel them.

20. At the hearing on Plaintiff's motion on September 16, 2014, the State advised the Court that, after a diligent search, law enforcement was unable to locate the missing recordings. The Court was therefore unable to compel their production.

21. Plaintiff's criminal trial occurred in Chatham County Superior Court in April 2015 before the Honorable Timothy Walmsley.

22. During the trial, both Plaintiff and his mother, who was traveling behind Plaintiff in a separate car at the time of the accident, testified that Plaintiff lost control of his truck when a vehicle suddenly and improperly merged onto I-516 in front of him. During its closing argument, the State attacked Plaintiff's and his mother's account of events as biased.

23. The jury found Plaintiff guilty on all counts and he was sentenced to a total of 18 years with 8 years to serve.

24. Thereafter, in a related civil action against Plaintiff, his civil attorney took the depositions of several law enforcement officers involved in investigating the accident.

25. During those depositions on or about June 9, 2016, one or more witnesses stated that they were disturbed by the absence of the missing recorded interviews of several witnesses, including Mr. Shadle.

26. Following these depositions, one of the witnesses returned to the police department and was soon able to retrieve Mr. Shadle's missing interview video.

27. This evidence was provided to Plaintiff's civil attorney on or about June 20, 2016, who then provided it to his criminal defense counsel the following day.

28. Upon receipt of the video recording of Mr. Shadle's interview, Plaintiff and his criminal counsel learned for the first time that Mr. Shadle's actual statement that he gave to Defendant Robinson contradicted those contained in the official report and matched Plaintiff's account of events.

29. On June 29, 2016, Plaintiff's criminal defense attorney filed an Amended Motion for New Trial based upon the newly-revealed video recording of Mr. Shadle's interview.

30. In his order granting Plaintiff a new criminal trial, Judge Walmsley noted that Defendant Robinson's official written summary of his interview with Mr. Shadle was "materially different" from the recorded statement and "clearly fail[ed] to properly summarize the witness' statement." (See 12/16/16 Order, attached hereto as Exhibit "C", at p. 7).

31. The Court also expressed its belief that the conduct of Defendant Robinson went beyond mere oversight or sloppiness when it stated, "[T]he true nature of Shadle's statement was obscured by Det. Robinson, who inappropriately altered the statement in a written report." (Id. at p. 7) (emphasis added).

32. Such intentional alteration, the Court found, was sufficient to deceive Plaintiff's criminal counsel into believing that Mr. Shadle was an unhelpful witness and reasonably cause her to refrain from further investigating what he had observed:

“Here, trial counsel was effectively misled by the police on the substance of Shadle's statement. Given what she was provided, it was not unreasonable for her to have made a strategic choice to discount Shadle as a witness that could have been beneficial to Cannon's defense.” (Id. at p. 10).

33. In addition to finding that Defendant Robinson “inappropriately altered” Mr. Shadle's statement so that it was “materially different” from what he actually said, the Court determined that the outcome of Plaintiff's criminal trial would likely have been different had Mr. Shadle's statement not been suppressed. As stated by the Court, “[T]here is a reasonable probability that the outcome of the trial would have been different if Shadle's actual statement had been disclosed in discovery.” (Id. at p. 13).

34. As the date for Plaintiff's new criminal trial approached, Assistant District Attorney Scott Robichaux recommended to District Attorney Meg Heap that the case be dismissed.

35. In a December 2017 memo to Ms. Heap, Mr. Robichaux based his recommendation upon the “significant inconsistency” between Defendant Robinson's report and Mr. Shadle's recorded statement. Such inconsistency, Robichaux determined, brought “the credibility of witnesses into the question.”

36. On January 3, 2018, the State moved to *nolle prosequi* the case against Plaintiff as a result of discovering the fact that Mr. Shadle's statement had been altered.

37. Judge Walmsley signed the order granting the motion the same day. (See Copy of Motion and Order, attached hereto as Exhibit “D”).

38. By the time the criminal charges against Plaintiff were dropped, he had spent approximately two and a half years in prison.

III. CAUSES OF ACTION

COUNT I – 42 U.S.C. § 1983

Suppression and Alteration of Material Exculpatory Evidence *(Against Defendant Robinson)*

39. At all times relevant to this Complaint, Defendant Robinson acted under color of state law as a law enforcement officer with SPD, formerly SCMPD.

40. Plaintiff had a clearly established constitutional right to receive unaltered material exculpatory evidence under the Fifth Amendment to the United States Constitution.

41. Defendant Robinson illegally, wrongfully and unconstitutionally altered material exculpatory evidence.

42. Specifically, Defendant Robinson materially and intentionally altered Mr. Shadle’s statement in his official report. Such alterations dramatically mischaracterized Mr. Shadle’s account of events and concealed the fact that his recollection matched those of Plaintiff and his mother.

43. As the trial judge determined and as the District Attorney concluded, Plaintiff's criminal trial would likely have resulted in a different outcome had an accurate account of Mr. Shadle's statement been provided.

44. In addition, Defendant Robinson wrongfully withheld the video recording of Mr. Shadle's interview, thereby preventing such evidence from being turned over to Plaintiff and his defense counsel.

45. A reasonable law enforcement official would have understood that substantially altering and suppressing material exculpatory evidence violated the Fifth Amendment's Due Process Clause. Defendant Robinson's conduct lies so obviously at the very core of what the Due Process Clause prohibits that the unlawfulness of his conduct was readily apparent to him.

46. Defendant Robinson's suppression of material exculpatory evidence deprived Plaintiff of his Fifth Amendment right to receive material exculpatory evidence.

47. Furthermore, Defendant Robinson, instituted, or caused to be instituted, a criminal proceeding against Plaintiff by intentionally submitting an official report that materially altered the statement given by a key eyewitness, Mr. Shadle.

48. The summary of Mr. Shadle's statement contained in Defendant Robinson's report was fraudulent and false as there was no probable cause for Plaintiff's detention and prosecution.

49. The ensuing detention and prosecution of Plaintiff depended upon the fraudulent and false report prepared by Defendant Robinson, as evidenced by the fact that

upon learning of the false report, the State dismissed the criminal charges against Plaintiff.

50. There was no intervening prosecutorial decision between Plaintiff's indictment and the dismissal of the charges against him which was made free from the fraudulent and false report prepared by Defendant Robinson.

51. By instituting, or knowingly causing the institution of, the criminal proceeding against Plaintiff without probable cause, Defendant Robinson acted with malice or under such circumstances that the law will imply malice.

52. The judicial proceeding against Plaintiff was terminated in Plaintiff's favor.

53. As a result of Defendant Robinson's conduct, Plaintiff was maliciously prosecuted and wrongfully detained in violation of his rights under the Fourth and Fourteenth Amendments.

54. The aforesaid conduct by Defendant Robinson proximately caused damage to Plaintiff in that it caused him to experience loss of money, loss of income, pain, suffering, embarrassment, humiliation, extreme mental anguish, and severe emotional distress.

COUNT II - 42 U.S.C. §1983

Policy, Practice, Procedure or Custom
(Against Defendant City of Savannah)

55. The Savannah Police Department ("SPD"), formerly SCMPD, is the law enforcement department of Defendant City of Savannah, which was authorized to and did operate and manage the SPD.

56. At all times relevant to this Complaint, SPD had a policy, practice, procedure and/or custom which permitted employees to alter material exculpatory evidence and/or suppress it from being turned over to criminal defendants and their counsel.

57. This policy, practice, procedure or custom of Defendant City of Savannah, caused a violation of Plaintiff's constitutional rights under the Fourth, Fifth, and Fourteenth Amendments, as described above.

58. Specifically, the Savannah Police Department placed into effect a program that it either knew or should have known would amount to exculpatory evidence being withheld from criminal defendants and/or being materially altered.

59. This unofficial policy by the Savannah Police Department amounts to a department-wide exhibition of deliberate indifference to the constitutional rights of suspects and defendants, such as Plaintiff.

60. The Savannah Police Department implemented and controlled this unofficial policy, practice, procedure, and/or custom and encouraged and/or allowed its officers, including Defendant Robinson, to alter material exculpatory evidence and/or withhold it from criminal defendants and their counsel.

61. The Savannah Police Department had direct and actual, or at least constructive, knowledge of the constitutional violations that were taking place under this policy.

62. The moving force behind Plaintiff's unlawful prosecution and detention was the Savannah Police Department's deliberate indifference to Plaintiff's constitutional

rights. Upon information and belief, the Savannah Police Department has repeatedly disregarded the constitutional rights of suspects and criminal defendants in a similar manner.

63. Plaintiff's wrongful conviction and incarceration was the obvious consequence of, and are directly linked to, this unofficial practice of the Savannah Police Department, and the actions of Defendant Robinson.

64. As a direct and proximate result of Defendant City of Savannah's actions, Plaintiff is entitled to damages, including loss of money, loss of income, pain, suffering, embarrassment, humiliation, extreme mental anguish, and severe emotional distress.

COUNT III – 42 U.S.C. §1983

Failure to Train
(Against Defendant City of Savannah)

65. At times relevant to this Complaint, Defendant City of Savannah was authorized to and did operate and manage the Savannah Police Department.

66. Defendant City of Savannah is and was at all times required to operate and manage its police practices and activities in a manner that is not deliberately indifferent to the rights of their citizens, including Plaintiff, who come into contact with its police officers.

67. Defendant City of Savannah police officers routinely have to interact with suspects, witnesses, and evidence and should be trained to do so.

68. Defendant City of Savannah acted with deliberate indifference to Plaintiff's rights by failing to train its police officers in at least the following ways:

- a) Failing to adequately train its police officers on how to record, store, and retrieve video interviews of witnesses;
- b) Failing to adequately train its police officers on the importance of not altering material evidence in criminal investigations and the severe consequences that may result otherwise;
- c) Failing to adequately train its police office on how to receive, process, and respond to requests from prosecutors for evidence, including exculpatory evidence, in criminal cases.

69. Defendant City of Savannah acted with deliberate indifference to the rights of Plaintiff in its failure to properly train its police officers regarding the appropriate handling of witness statements and exculpatory evidence.

70. Defendant City of Savannah's deliberate indifference to the rights of Plaintiff through its failures to train were failures of policy, widespread practice, and/or custom.

71. Defendant City of Savannah's systemic training failures proximately caused Plaintiff's improper indictment, prosecution, and incarceration in that they proximately, directly, and foreseeably caused Plaintiff to be accused, tried and convicted of a crime of which he was innocent.

72. As a direct and proximate result of Defendant City of Savannah's systemic,

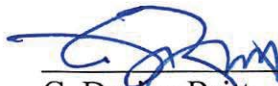
unconstitutional training practices or policies Plaintiff is entitled to damages, including loss of money, loss of income, pain, suffering, embarrassment, humiliation, extreme mental anguish, and severe emotional distress.

WHEREFORE, Plaintiff prays as follows:

- A) For a trial by jury;
- B) For an award of compensatory and consequential damages for the harm suffered by Plaintiff;
- C) For an award of the costs of this action, including the fees and costs of experts, together with reasonable attorneys' fees;
- D) For an award of punitive damages against Defendant Robinson in an amount sufficient to punish and deter such conduct;
- E) For such other, further and different relief as this Court may deem just and proper.

This 24th day of July, 2018.

McKENZIE & HART, LLC



C. Dorian Britt
Georgia Bar No. 083259
Jeremy McKenzie
Georgia Bar No. 436655

21 West Park Avenue
Savannah, Georgia 31401
(912) 335-4977
(912) 388-2503

KARSMAN, McKENZIE & HART

An Association of Professional Entities

TELEPHONE: (912) 335-4977
FACSIMILE: (912) 388-2503
WWW.KMTRIAL.COM

STANLEY M. KARSMAN
JEREMY S. McKENZIE
R. PAUL HART
C. DORIAN BRITT
NICHOLAS S. EVANS

21 WEST PARK AVENUE
SAVANNAH, GA 31401

May 25, 2018

Via Certified Mail, Return Receipt Requested

Eddie DeLoach
Mayor, City of Savannah
P.O. Box 1027
Savannah, Georgia 31402

Via Certified Mail, Return Receipt Requested

Brooks Stillwell
City Attorney, City of Savannah
P.O. Box 1027
Savannah, Georgia 31402

Via Certified Mail, Return Receipt Requested

Rob Hernandez
City Manager, City of Savannah
P.O. Box 1027
Savannah, Georgia 31402

Via Certified Mail, Return Receipt Requested

R. Jonathan Hart, Esq.
Chatham County Attorney
124 Bull Street
Suite 240
Savannah, Georgia 31401

Via Certified Mail, Return Receipt Requested

Jeff Hadley, Chief
Chatham County Police Dept.
9306 Whitefield Ave.
Savannah, Georgia 31401

Via Certified Mail, Return Receipt Requested

John T. Wilcher, Sheriff
Chatham County, Georgia
1050 Carl Griffin Drive
Savannah, Georgia 31405

Via Certified Mail, Return Receipt Requested

Albert J. Scott, Chairman
Chatham County Board of Commissioners
124 Bull St # 210
Savannah, GA 31401

Re: **ANTE LITEM NOTICE**

Our Client: Trever Chase Cannon
Dates of Incident: October 16, 2013 – January 3, 2018
Type of Incident: Falsification of Police Report/Concealment of *Brady* material
Location: Chatham County DA's office and Savannah-Chatham Metropolitan Police Department

To Whom It May Concern:

Please be advised that this law firm represents Trever Chase Cannon. Mr. Cannon was involved in an automobile accident on February 22, 2013 on I-516 that resulted in two fatalities. Mr. Cannon advised investigators at the time that he had been unexpectedly cut-off by a vehicle that was improperly merging onto I-516 in front of him, causing him to swerve and lose control

Trever Chase Cannon
Ante Litem Notice
May 25, 2018

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of his vehicle. Within minutes after the collision, an eyewitness to the incident, Tom Shadle, was interviewed by Detective Robert Robinson, who, at the time, was a member of the Savannah-Chatham Metropolitan Police Department's Major Accident Investigation Team ("M.A.I.T."). The interview was recorded on video by Det. Robinson. In his interview, Mr. Shadle stated that he was traveling behind a vehicle that was merging onto I-516 into the path of Mr. Cannon's truck, which was in the outside lane of I-516. Mr. Shadle further stated that the vehicle failed to yield to Mr. Cannon and Mr. Cannon was forced to swerve from the outside lane of I-516 in order to avoid hitting the merging vehicle, and lost control of his truck. Mr. Shadle's statements were therefore entirely consistent with those of Mr. Cannon.

However in his official report, Det. Robinson materially altered the statements made by Mr. Shadle. Det. Robinson placed Mr. Shadle on the wrong section of roadway. Det. Robinson erroneously reported that Mr. Shadle was traveling directly behind Mr. Cannon's truck. Det. Robinson fabricated Mr. Shadle's statement that he observed Mr. Cannon "traveling at a high rate of speed." Most importantly, Det. Robinson failed to mention the other vehicle that was attempting to merge onto I-516 and that cut Mr. Cannon off. The number and significance of the inaccuracies and omissions in Det. Robinson's summary of Mr. Shadle's interview is extremely troubling.

Based upon Det. Robinson's official report, the State of Georgia pursued criminal charges against Mr. Cannon for two counts each of 1st degree vehicular homicide, serious injury by vehicle, and reckless driving. In order to win a conviction on these counts, the State had to prove that Mr. Cannon was driving in reckless disregard for the safety of persons or property, and not simply speeding.

When the recording of Det. Robinson's interview with Mr. Shadle, along with nine other recordings of interviews of witnesses conducted by the police, were not provided to the defense, Mr. Cannon's defense attorney filed a motion to compel them. At the hearing on the motion on September 16, 2014, the State advised the Court that after a diligent search, the police department was unable to locate the missing recordings. The Court was therefore unable to compel their production.

Mr. Cannon's trial occurred in April 2015 before the Honorable Timothy Walmsley. The jury found Mr. Cannon guilty on all counts and he was sentenced to a total of 18 years in prison with 8 years to serve.

Thereafter, in a related civil action against Mr. Cannon, his attorney took the depositions of several members of SCMPD's M.A.I.T. on June 9, 2016. During those depositions, the witnesses stated that they were disturbed by the absence of the missing recorded interviews of several witnesses, include Mr. Shadle. Following these depositions, one of the M.A.I.T. members returned to the police department and was quickly able to retrieve five of the missing video interviews, including Mr. Shadle's. This evidence was provided to Mr. Cannon's civil attorney on June 20, 2016, who provided it to his criminal defense counsel the following day.

On June 29, 2016, Mr. Cannon's criminal defense attorney filed an Amended Motion for New Trial based upon the failure of the State to furnish exculpatory evidence as required by Brady v. Maryland, 373 U. S. 83 (1963). After expressing grave concerns about the conduct of

Trever Chase Cannon
Ante Litem Notice
May 25, 2018

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the prosecution and law enforcement in this matter, Judge Walmsley granted Mr. Cannon a new trial on December 16, 2016.

In December 2017, Assistant District Attorney Scott Robichaux recommended to District Attorney Meg Heap that the charges against Mr. Cannon be dropped based upon "a significant inconsistency" between Mr. Shadle's statements in his video interview and Det. Robinson's report. On January 3, 2018, the State moved to *nolle prosequi* all charges against Mr. Cannon. By that time, Mr. Cannon had spent approximately two and a half years in prison. My client intends to assert federal and/or state law claims against those persons and entities involved in the falsification of Mr. Shadle's statement and the concealment of the video of his interview with Det. Robinson.

Please allow this letter to serve as Mr. Cannon's *ante litem* notice to Chatham County and the City of Savannah to the extent required by O.C.G.A. § 36-11-1 and O.C.G.A. § 36-33-5. As a result of being wrongfully accused, prosecuted, convicted, sentenced, and incarcerated for alleged crimes that he did not commit, Mr. Cannon incurred significant criminal defense costs and fees and lost substantial wages during his time in prison. Mr. Cannon has also suffered, and continues to suffer, severe mental anguish, distress, anxiety, and depression as a result of this ordeal. My client hereby demands the amount of \$1,000,000.00 as compensation for the injuries and losses he sustained as a result of this incident.

If you wish to discuss this matter further, please give me a call.

Sincerely,



C. Dorian Britt

CDB/gs

cc: Trever C. Cannon

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
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1. Article Addressed to:

Eddie DeLoach, Mayor, City of Savannah
PO Box 1027
Savannah, GA 31402-1027

COMPLETE THIS SECTION ON DELIVERY

A. Signature Agent
Eddie DeLoach Addressee

B. Received by (Printed Name) Date of Delivery
Tim Jones *June 18*

D. Is delivery address different from item 1? Yes No
 If YES, enter delivery address below:

3. Service Type

Certified Mail® Priority Mail Express™
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1. Article Addressed to:

Brooks Stillwell, City Atty for Savannah
PO Box 1027
Savannah, GA 31402-1027

COMPLETE THIS SECTION ON DELIVERY

A. Signature Agent
[Handwritten Signature] Addressee

B. Received by (Printed Name) C. Date of Delivery
Timothy S. Smith

D. Is delivery address different from item 1? Yes No
 If YES, enter delivery address below:

3. Service Type

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4. Restricted Delivery? (Extra Fee) Yes

2. Article Number
(Transfer from service lab) 7016 3010 0000 1264 3088

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1. Article Addressed to:

Rob Hernandez , City of Savannah
PO Box 1027
Savannah, GA 31402-1027

COMPLETE THIS SECTION ON DELIVERY

A. Signature Agent
Rob Hernandez Addressee

B. Received by (Printed Name) C. Date of Delivery
Rob Hernandez _____

D. Is delivery address different from item 1? Yes No
 If YES, enter delivery address below:

3. Service type

- Certified Mail® Priority Mail Express™
- Registered Return Receipt for Merchandise
- Insured Mail Collect on Delivery

4. Restricted Delivery? (Extra Fee) Yes

2. Article Number
(Transfer from service label)

7016 3010 0000 1264 3057

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1. Article Addressed to:

R. Jonathan Hart, Chatham County Atty
124 Bull Street Rm 240
Savannah, GA 31401-3750

COMPLETE THIS SECTION ON DELIVERY

A. Signature Agent
 X  Addressee

B. Received by (Printed Name) Date of Delivery
 Vernon R. Frazer 6-30-18

D. Is delivery address different from item 1? Yes
 If YES, enter delivery address below: No

3. Service Type

Certified Mail® Priority Mail Express™
 Registered Return Receipt for Merchandise
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 4. Restricted Delivery? (Extra Fee) Yes

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SENDER: COMPLETE THIS SECTION	COMPLETE THIS SECTION ON DELIVERY
<p>1. Article Addressed to:</p> <p>John T. Wilcher, Sheriff, Chatham Cnty 1050 Carl Griffin Drive Savannah, GA 31405-1327</p>	<p>A. Signature <input checked="" type="checkbox"/> Agent <input type="checkbox"/> Addressee</p> <p>B. Received by (Printed Name) <u>MMR</u> C. Date of Delivery <u>5-31-18</u></p> <p>D. Is delivery address different from item 1? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No If YES, enter delivery address below:</p>
<p>2. Article Number (Transfer from service label)</p> <p>7016 3010 0000 1264 3101</p> <p>PS Form 3811, July 2013 Domestic Return Receipt</p>	<p>3. Service Type</p> <p><input checked="" type="checkbox"/> Certified Mail® <input type="checkbox"/> Priority Mail Express™ <input type="checkbox"/> Registered <input type="checkbox"/> Return Receipt for Merchandise <input type="checkbox"/> Insured Mail <input type="checkbox"/> Collect on Delivery</p> <p>4. Restricted Delivery? (Extra Fee) <input type="checkbox"/> Yes</p>

SENDER: COMPLETE THIS SECTION

1. Article Addressed to:

Jeff Hadley, Chatham County Police Dept.
9306 Whitefield Ave.
Savannah, GA 31406-6945

COMPLETE THIS SECTION ON DELIVERY

2. Article Number
 (Transfer from service label)
 PS Form 3811, July 2013

3. Service Type
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 Insured Mail
 Priority Mail Express™
 Return Receipt for Merchandise
 Collect on Delivery

4. Restricted Delivery? (Extra Fee) Yes No

5. Date of Delivery
 6/21/18

A. Signature
 Agent Addressee

B. Received by (Printed Name)

D. Is delivery address different from item 1? Yes No
 If YES, enter delivery address below:

2. Article Number
 (Transfer from service label)
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- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Albert J. Scott, Chatham Cty Commission
124 Bull Street Rm 210
Savannah, GA 31401-3758

COMPLETE THIS SECTION ON DELIVERY

A. Signature Agent
 [Signature] Addressee

B. Received by (Printed Name) C. Date of Delivery
Kenneth O. Francis **5-31-18**

D. Is delivery address different from item 1? Yes
 If YES, enter delivery address below: No

3. Service Type Priority Mail Express™
 Certified Mail® Return Receipt for Merchandise
 Registered Collect on Delivery
 Insured Mail Restricted Delivery? (Extra Fee) Yes

2. Article Number (Transfer from service label) **7016 3010 0000 1264 3071**

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IN THE SUPERIOR COURT OF CHATHAM COUNTY
STATE OF GEORGIA

FILED IN OFFICE

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STATE OF GEORGIA,

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vs.

Indictment No. CR13-2235-J2

TREVER CANNON,

Defendant.

ENTERED S.C.F. DEC 20 2016

ORDER GRANTING DEFENDANT'S MOTION FOR NEW TRIAL

After reading and considering Defendant's Motion for New Trial (as amended), the State's Response, reviewing all argument and evidence of record, and the applicable law, the Court **GRANTS** the Motion.

On October 16, 2013, Trever Cannon ("Defendant" or "Cannon"), was indicted by a Chatham County Grand Jury for the offenses of Homicide by Vehicle in the First Degree (2 Counts), Serious Injury by Vehicle (2 Counts), and Reckless Driving.

From April 20, 2015, through April 23, 2015, Defendant was tried before a Chatham County jury in this Court. At the conclusion of the jury trial, Defendant was found guilty on all counts. After conducting a sentencing hearing the Court sentenced Cannon to a total of 18 years with 8 years to serve.

On May 19, 2015, the Defendant filed a timely motion for new trial claiming he should be acquitted and discharged due to the State's failure to prove guilt beyond a reasonable doubt; that the Court committed an error of law warranting a new trial; and that the verdict is contrary to law and principles of justice and equity. On that same date the Defendant's trial counsel ("Trial Counsel") filed a Motion to Withdraw.

On June 10, 2015 Defendant's new counsel ("Appellate Counsel") filed a second Motion for New Trial claiming that the verdict is contrary to the weight of the evidence and the principles of justice and equity, the verdict is decidedly and strongly against the weight of the evidence, and that "the trial is rife with procedural and substantive errors that denied [Cannon] a fair trial under the United States and Georgia Constitutions as well as Georgia law...". Subsequent to this filing the Court originally scheduled an evidentiary hearing on August 3, 2015. The original hearing was continued on a

number of occasions at the request of both the State and Defendant and finally occurred on December 7, 2015.

On March 8, 2016 the Defendant filed a Brief in Support of his Amended Motion for New Trial claiming again that the evidence was not sufficient to support a conviction, the trial court erred by excluding the testimony of the Defendant's expert, the trial court erred by restricting Trial Counsel's questioning of Officer Shook, that Trial Counsel was ineffective for failing to disclose portions of the expert's report in a timely manner, and that Trial Counsel was ineffective by failing to introduce evidence of alleged road defects that may have been material to the case.

On June 29, 2016 Defendant filed an Amended Motion for New Trial claiming that the Defendant had learned for the first time on June 21, 2016 that the State had failed to turn over exculpatory evidence in violation of Brady v. Maryland, 373 U.S. 83 (1963). The evidence at issue was first brought to the Court's attention on October 24, 2014, at which time Cannon's prior counsel filed a "Motion to Compel Disclosure and Production" specifically referencing, among other things, audio and video recordings of all witnesses, including a paramedic who observed the accident and stopped to assist named Tom Shadle ("Shadle"). The SCMPD case file for the investigation shows that Detective Robinson recorded his interview with Shadle on the scene of the accident approximately 45 minutes after the accident occurred. The recording made of Detective Robinson's interview with Shadle, along with nine other recordings of interviews conducted by the police, were not included in the State's production in this case

This Court conducted a hearing on the Motion to Compel on September 16, 2014. There, Defendant's counsel specifically requested the recording of the interview of Shadle (See Transcript from Motion Hearing, 9/16/14, 3-4). In response, the State informed the Court that it was trying to find the requested items, but after a diligent search the police department was unable to locate them. (*Id.*, 4) At the conclusion of the hearing the Court stated it could not compel production at that time because "there was nothing to produce." (*Id.*, 5) The Court noted, however, the State's continuing obligation to turn over Brady material.

After the trial of the case, on June 9, 2016, in a related civil case, Barnes v. Cannon, Civil Action No. STCV1401260, civil counsel for Cannon questioned Officers

Frandrigh, Shook and McCoy of the Major Accident Investigation Team ("MAIT") of the Savannah-Chatham County Metropolitan Police Department ("SCMPD") about the absence of Shadle's recorded interview from the police department's official case file. After those depositions concluded Officer Frandrigh returned to the police department and was able to locate five of the missing interviews taken at the scene, including the interview of Shadle. The City Attorney for the City of Savannah then turned over the evidence to civil counsel on June 20, 2016.

In the recorded interview, located by Frandrigh and turned over to the Defendant on June 21, 2016, Shadle tells Detective Robinson:

I was going to the doctor's office on Jackson Boulevard, I was coming off Veteran's Parkway going onto eastbound 516, coming down the merge lane to merge onto 516. Had one eye on the road ahead of me and one eye on the mirror to look for traffic that I was going to merge into. There was a vehicle ahead of me that seemed like to me they should have yielded to the traffic that was on 516 but they didn't they continued to merge onto 516. There was a pickup truck that I observed on 516, appeared that he swerved to avoid hitting that car and another vehicle that was in the inside lane on 516. That caused him to cross the median and I believe he rolled maybe multiple times

In discovery the State had produced a written summary of the recorded interview prepared by Detective Robinson. Robinson's written summary states:

Detective R. Robinson did an audio/video interview with Mr. Tom Shadle. Mr. Shadle advised that he was exiting of (sic) Chatham Parkway onto I-516 and he was travelling eastbound on I-516, Mr. Shadle was behind the pickup truck and he advised that the pickup truck was travelling at a high rate of speed as traffic slowed down the pickup truck swerved from the outside lane into the inside lane he lost control struck the median flipped and went into the opposite lane of traffic and struck the SUV.

The Defendant claims that the recorded statement is exculpatory because it undermines the State's claim that the proximate cause of the collision was Cannon driving at a high rate of speed and weaving in and out of traffic. More specifically, that the recorded interview undermines the State's theory of guilt and directly corroborates the Defendant's testimony at trial.

The Court then granted another evidentiary hearing prior to ruling on the Amended Motion for New Trial for the Defendant and the State to address Shadle's

recorded interview before the Court. At this hearing, the Defendant also referenced five additional recorded interviews that had still not been located by the State. At the conclusion of the hearing the State was ordered by the Court to make a diligent search for the five additional missing recordings and then file an affidavit with the Court documenting the efforts made by the State to locate the recorded interviews. On September 9, 2016 the State filed an affidavit and disclosed that the five additional recorded interviews had been located and were being provided to the Defendant.¹

RELEVANT FACTS

A. FACTS OF THE CASE

On September 22, 2013 Cannon was driving his pickup truck eastbound on I-516 in Chatham County. The speed limit on the road was 55 miles per hour (T 91). It had been raining in the area that day and the roadway was wet (T 53, 78, 92). Around 2:00 p.m., Cannon lost control of his pickup truck and crossed the median into oncoming traffic. After crossing the median he struck a sport utility vehicle occupied by Cami and Stephen Joyner along with their young child. Mr. and Mrs. Joyner died as a result of the accident and the child was injured. In addition, Irven Williams was travelling westbound on the interstate at the time of the incident on a motorcycle and was forced to "lay down" the bike as Cannon crossed into oncoming traffic resulting in numerous injuries.

Cannon was tried and convicted of First Degree Vehicular Homicide for causing the death of the Joyners through the act of Reckless Driving (O.C.G.A. § 40-6-390). In support of the allegation of reckless driving the State alleged two factors. First, it claimed that Cannon was driving at a high rate of speed. Second, the State alleged that Cannon was weaving in and out of traffic.

¹ Despite the Court's instructions the affidavit did not explain the steps taken by the State to locate the five additional interviews. It remains unclear to the Court how, or why, the ten recorded interviews of witnesses to the incident at bar were not located prior to the trial of the case. Whether it was due to a lack of communication, or a lack of diligence, the result was that the Defendant was denied access to important information that now requires the Court to dolefully evaluate the fundamental fairness of the Defendant's trial. In sum, without a clear explanation, the State's cavalier approach used to address the discovery issue presented by the Defendant in 2014, and to then attempt again to locate the recorded interviews in 2016, remains a concern to the Court.

The State presented eight witnesses who were occupants of vehicles on I-516 and observed either the crash or its aftermath. Three of those witnesses observed the Cannon driving his vehicle prior to him losing control and crossing over the median. (T 78, 84, 88, 99, 145, 148, T 150). Irven Williams claimed to have seen Cannon's truck prior to the accident and stated that Cannon was "driving a little too quick" for the rain (T 54). Lowell Reed was traveling in the same direction as Cannon in I-516 just prior to the accident and estimated he was driving at approximately 55-60 miles per hour when Cannon passed him on the right (T 151). And finally, Porter Haskew testified:

[Haskew] saw a truck back behind [him] weaving in and out and coming up at a high rate of speed . . . [the truck] was right behind [Haskew] and [the truck] went over to the right to go around [him]. And when [the truck] did that, there was a car that was already merging on from . . . Veterans Parkway..., and so [Cannon], you know, darted around to get around [him]. And then when [Cannon] did that, the back of the truck just slid and lost traction. (T 150)

On the day of the accident Cannon told Detective Robinson that he believed he was going 50-55 miles per hour (T 61). Cannon testified at trial that he "might have been speeding a little bit" (T 242). Cannon also claimed that at the time of the accident he was changing lanes from the left lane to the right, "and a black car had pulled in from the . . . the ramp onto 516. And I slammed on the brakes and tried to swerve to miss hitting him . . ." (T 241).

Additional facts relevant to the court's opinion may be cited below.

B. EXCLUSION OF DEFENDANT'S EXPERT

An original Scheduling Order was issued in the case on March 20, 2014. A second Scheduling Order was issued on April 17, 2014, which ultimately became the operative order in this case ("Scheduling Order"). The Scheduling Order provided a discovery deadline of June 16th, 2014.² After the entry of the Scheduling Order the Court addressed discovery issues, bond issues, and motions. Ultimately, the case was set for Trial on September 22, 2014. However, the case was not reached at that time.

The case was then scheduled for trial on November 18, 2014. However, on November 7, 2014 the State moved to continue the trial setting based on the

² The Defendant opted into reciprocal discovery with the State on April 2, 2014.

unavailability of the coroner. Then, on November 13, 2014, Defendant's Trial Counsel made her first appearance in the case.³ The State's motion for continuance was granted, and the case was scheduled for trial on February 9, 2015.

On February 6, 2015, just three days prior to the scheduled trial, the Defendant filed an "Amended Defense Discovery Disclosure" providing a DOT Audit Report and three collision diagrams created by an expert witness, Eric Naugle ("Naugle"). The Defendant also produced a "report" prepared by Naugle that outlined his opinions and conclusions concerning the relevant collision (all collectively referred to as the "Initial Disclosure"). On February 10, 2015 the State filed a Motion to Exclude Defendant's Expert claiming, *inter alia*, that although Naugle had been known to the parties prior to Trial Counsel's appearance in the case he had (1) refused to discuss the case with the State, and (2) the Defense had provided a written report to the State for the first time on February 6, 2015.

After considering the record the Court entered an order dated February 19th, 2015, *nunc pro tunc* to February 10th, denying the State's motion to exclude the Defense expert. The Court continued the case "to provide the State with sufficient time to review the information provided by the Defendant and to consult with its own expert, if necessary."

The case was then set for trial on April 20, 2015. On the third day of trial Naugle provided the Defense with a supplemental report which set forth a number of new opinions and calculations, as well as an updated CV ("Supplemental Report").⁴ The State was provided the new information after it rested, but before the Defense presented its case-in-chief. The State moved to exclude Naugle due to the late disclosure of his new opinions and calculations. After considering the matter under O.C.G.A § 17-16-6 the Court found that by not producing the Supplemental Report on a

³ The Defendant had previously been represented by the Office of the Public Defender.

⁴ The Initial Disclosure contained a DOT audit report, three diagrams, and twenty-one (21) separate opinions/conclusions about the nature of the collision. The Supplemental Report included some of the items in the Initial Disclosure but modified some of the original conclusions and expanded the number of opinions/conclusions to fifty-three (53). Some of the new conclusions conflicted with positions taken in the Initial Disclosure. Thus, if the Court were to have allowed the witness to testify only to the Initial Disclosure the witness would have been forced to testify to facts and conclusions apparently disputed in the Supplemental Report.

timely basis the Defendant had acted in bad faith and the that the State had been prejudiced. Accordingly, Naugle was excluded as a witness.⁵

OPINION AND CITATION OF AUTHORITY

A. BRADY VIOLATION

"[I]n order to be convicted of vehicular homicide by recklessly driving in violation of OCGA § 40-6-390, [Defendant's] conduct must have caused the death of [the victims]. This requires showing that the defendant's conduct was the "legal" or "proximate" cause, as well as the cause in fact, of the death." (Citations and punctuation omitted). McGrath v. State, 277 Ga. App. 825, 828, 627 S.E.2d 866, 869 (2006). However, "as long as the defendant's negligence proximately caused the injury of another, the crime has been committed, even if there are other factors which also are proximate causes of the injury. *Unlike the civil context, in the criminal context it simply is not relevant that [another] was negligent unless the defendant's conduct did not substantially contribute to the cause of the injury,*" (footnotes omitted, emphasis supplied.) McGrath v. State, 277 Ga. App. 825, 829, 627 S.E.2d 866, 870 (2006), quoting, Baysinger v. State, 257 Ga. App. 273, 570 S.E.2d 593 (2002). In this case the Defense was that Cannon's conduct was not the legal cause of the Joyners' deaths.

The Defendant posits that the recorded interview of Shadle is material to that inquiry, and there is no dispute that the interview was not produced by the State before trial.⁶ Instead, the State provided to the Defense Det. Robinson's written summary of his interview which clearly fails to properly summarize the witness' statement. In fact, Det. Robinson's written summary of Shadle's statement is materially different from the recorded statement recently produced. However, the fact that (1) the recorded statement was not produced, and (2) that it is materially different than the officer's summary, are not enough alone for the Court to find that the State violated Brady.

⁵ As conceded by the Defendant, this was a discovery violation, and the Court has broad discretion concerning issues of bad faith and prejudice in order to ensure a fair trial. Theophile v. State, 295 Ga. App. 517, 520, 672 S.E.2d 479, 482 (2009) ("belated notice precluded the state from adequately investigating the witness, thereby satisfying the prejudice requirement.").

⁶ Similarly, there can be no dispute that the additional nine interviews located by the State after the case had been tried were not produced.

In Brady v. Maryland, 373 U.S. 83 (1963), the United States Supreme Court established that the prosecution has a constitutional duty to disclose certain information to the defense. The duty applies to "material" information". In United States v. Bagley, 473 U.S. 667 (1985) the United States Supreme Court explained the standard for materiality in Brady challenges. The court held:

The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.

473 U.S. at 682. As explained by the Georgia Supreme Court in Walker v. Johnson, 282 Ga. 168, 646 S.E.2d 44 (2007):

To succeed on his Brady claim, [the Defendant is] required to show: (1) the State possessed evidence favorable to his defense; (2) he did not possess the favorable evidence and could not obtain it himself with any reasonable diligence; (3) the State suppressed the favorable evidence; and (4) had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the trial would have been different.

282 Ga. at 169, 646 S.E.2d at 46; Danforth v. Chapman, 297 Ga. 29, 30, 771 S.E.2d 886, 887 (2015)

The Court applies Brady as follows:

1. The State Possessed Evidence Favorable to Cannon's Defense.

In this case, the State was in possession of ten (10) recorded statements that were not provided to the Defendant before trial. The State does not dispute that officers with the Savannah Chatham Metropolitan Police Department recorded the interviews and that the recordings were ultimately located by the police after the trial had concluded.

The evidence, particularly the interview of Shadle, is favorable to Cannon's defense. To be sure, Shadle's recorded interview is consistent with Cannon's version of the events leading up to his loss of control on I-516. (T. 241). Furthermore, Shadle's statement is consistent with the testimony of Ginger Cannon, the Defendant's mother (T. 233-234) and is unclouded by either time or claims of bias.⁷

⁷ The testimony of both the Defendant, who took the stand, and his mother were attacked as biased in the State's closing argument.

2. Cannon did not Possess the Favorable Evidence.

The question this court must wrestle with is whether Defendant's lawyer was reasonably diligent in her efforts to obtain Shadle's actual statement. First, as has been established, the Defendant did not possess Shadle's statement. Instead, the Defendant was provided in discovery with a written summary of Shadle's statement, which is now understood to be materially different from his recorded statement.

Again, in this case, the investigating law enforcement agency was in possession of ten (10) eyewitness interviews all of which may have been material to the case. In Shadle's recorded statement he appears to corroborate the Defendant's version of the facts. The statement also appears to parallel Porter Haskew's testimony at trial. However, the true nature of Shadle's statement was obscured by Det. Robinson, who inappropriately altered the statement in a written report. His written report was then turned over to the Defendant in discovery.

The State argues that there was no Brady violation because Shadle was known to the Defendant as a potential witness, and thus Cannon's Trial Counsel should have contacted Shadle and in so doing discovered the true nature of his testimony.^{8,9} However, "[t]rial counsel has a duty to make a reasonable investigation." Horne v. State, 298 Ga. App. 601, 605, 680 S.E.2d 616, 620 (2009). As the United States Supreme Court has explained:

Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation [into the law and the relevant facts] are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.

⁸ Trial Counsel at the hearing on Defendant's Motion for New Trial testified that if Shadle was on the witness list she would have contacted him, but has no specific memory of doing so. At the hearing on Defendant's Motion for New Trial, Appellate Counsel stated that she had reviewed Trial Counsel's entire file and did not find any reference to having contacted Shadle.

⁹ The State's position produces a double-edged sword. Either Trial Counsel was diligent and was misled by Det. Robinson's summary. Or, her attention to the Shadle statement was deficient.

Wiggins v. Smith, 539 U.S. 510, 521-22 (2003) (citation and punctuation omitted). See also Terry v. Jenkins, 280 Ga. 341, 346-47, 627 S.E.2d 7, 11-12 (2006); McLaughlin v. State, 338 Ga. App. 1, 11, 789 S.E.2d 247, 255 (2016). Here, trial counsel was effectively misled by the police on the substance of Shadle's statement. Given what she was provided, it was not unreasonable for her to have made a strategic choice to discount Shadle as a witness that could have been beneficial to Cannon's defense.

3. The State Suppressed the Favorable Evidence

The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. Brady, 373 U.S. at 87. This includes the suppression of impeachment evidence that may be used to challenge the credibility of a witness. See generally Giglio v. United States, 405 U.S. 150, 154-55 (1972).

As outlined above, on October 24, 2014, Cannon's prior counsel filed a "Motion to Compel Disclosure and Production" specifically referencing, among other things, audio and video recordings of all witnesses, including a paramedic who observed the accident and stopped to assist named Tom Shadle. This Court had conducted a hearing on the motion to compel on September 16, 2014. There, Defendant's counsel specifically requested the recording of the interview of Tom Shadle (See Transcript from Motion Hearing, 9/16/14, 3-4). In response, the State informed the Court that it tried to locate the requested items by asking the police to look through their files. However, after what was described as a diligent search, the police department had been unable to locate the recorded interviews (*Id.* 4). The Court ruled that it could not compel production at that time because apparently "there was nothing to produce" (*Id.*, 5). The Court noted, however, the State's continuing obligation to turn over Brady material.

Despite Officer Fandrich (an agent of the state) locating the Shadle interview in June 2016, the Shadle interview was not turned over by the State upon its discovery, instead it was given to appellate counsel by Defendant's civil attorney. To date, the Court cannot locate a Certificate of Service showing that they have ever served appellate counsel with the Shadle interview. A hearing was then held on August 26,

2016, and continued to August 30, 2016, to address the issues raised by the Defendant based on the late disclosure of the statements. At the hearing on Defendant's Amended Motion the Defendant also referenced five (5) additional recorded interviews that had still not been located by the State. Those five additional interviews had also been the subject of the earlier motion to compel. The Court notes that on September 6, 2016, the State provided the Defense with those five (5) recorded statements, but not their copy of Shadle's interview.

At the conclusion of the hearing the State was ordered by the Court to make a diligent search for the five (5) additional missing recordings and then file an affidavit with the Court documenting the efforts made by the State to locate the recorded interviews. On September 9, 2016 the State filed an affidavit which disclosed that the five (5) additional recorded interviews had been located after the hearing and were being provided to the Defendant. The affidavit did not explain the steps taken by the State, or more specifically the police, to discover the missing interviews. It simply stated that the assigned assistant district attorney had contacted the police to ask that they look for the missing items – ostensibly, the same action taken in 2014. Thus, the Court must conclude that the items should have been located and produced to the Defendant back in 2014.

The State argues that it took reasonable steps to locate the missing statements prior to trial. However, even if those steps were deemed appropriate, the State's effort to locate the recordings prior to trial is not dispositive. It is now known that the video/audio recordings did exist, and that they were available had the police department looked for them thoroughly prior to trial. It is also now known that Det. Robinson's written summary of the Shadle interview is materially different than Shadle's actual statement. Under these circumstances the Court finds that Shadle's actual recorded statement was suppressed by the State.

4. A Reasonable Probability Exists that the Outcome of the Trial Would be Different.

Under the final prong of the analysis the Court must determine if there is a reasonable probability that had the Defendant been provided with Shadle's recorded statement the outcome of the trial would have been different. A "reasonable probability"

is a probability sufficient to undermine confidence in the outcome. Bagley, 473 U.S. at 682. In order to prove its case the State had to prove more than Cannon was simply speeding, it had to prove the Defendant was driving recklessly. Reckless driving occurs when a person drives a vehicle "in reckless disregard for the safety of persons or property." O.C.G.A. § 40-6-390(a). "[S]peeding, unaccompanied by other traffic violations, can form the basis for a reckless driving conviction if the state presents evidence that a defendant was driving at an excessive rate of speed given the posted speed limit and the driving conditions existing at the time," Evans-Glodowski v. State, 335 Ga. App. 484, 486, 781 S.E.2d 591, 594 (2016).

The State presented three witnesses who observed Cannon driving his vehicle prior to him losing control and crossing over the median. (T 78, 84, 88, 99, 145, 148, T 150). Irven Williams claimed to have seen Cannon's truck prior to the accident and stated that Cannon was "driving a little too quick" for the rain (T 54). Lowell Reed was traveling in the same direction as Cannon in I-516 just prior to the accident and estimated he was driving at approximately 55-60 miles per hour when Cannon passed him on the right (T 151). And finally, Porter Haskew testified that he "saw a truck back behind [him] weaving in and out and coming up at a high rate of speed..." (T 150). On the day of the accident Cannon told Detective Robinson that he believed he was going 50-55 miles per hour (T 61). Cannon testified at trial that he "might have been speeding a little bit" (T 242). Cannon also claimed that at the time of the accident he was changing lanes from the left lane to the right, "and a black car had pulled in from the . . . the ramp onto 516. And [he] slammed on the brakes and tried to swerve to miss hitting him..." (T 241).

The trial testimony focuses on Cannon's driving at about the time of the incident. Once Shadle's actual Statement is factored into the evidence the trial testimony must be viewed differently. First, Cannon's testimony can no longer be completely discounted as biased because Shadle appears to confirm that a driver merging onto I-516 cut Cannon off as he travelled eastbound. Next, the treatment and existence of Shadle's recorded statement undermines the police investigation. Not only did the police "lose" Shadle's statement, but what was given to the Defense was materially different than the written summary provided by MAIT. This calls into question all police evidence,

including, but not limited to, Officer Shook's testimony. Shadle's statement also allows for the direct impeachment of any witness who claims that Cannon was driving recklessly. The testimony at trial may lead one to conclude that Cannon was "speeding", but the State had to prove more. The State had to prove that the speed was excessive given the conditions at the time. To do so the State presented evidence through Haskew that the Defendant was weaving. However, Shadle's statement appears to contradict Haskew.

In this analysis the Court cannot ignore an analysis of the effectiveness of Trial Counsel. As explained in greater detail below the Court finds herein that Trial Counsel was ineffective. Some of the deficiencies included her handling of Naugle and Officer Shook. Given the suppression of Shadle's statement and the issues described below the Court concludes that there is a reasonable probability that the outcome of the trial would have been different if Shadle's actual statement had been disclosed in discovery.

B. THE DEFENDANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION I, PARAGRAPH XIV OF THE 1983 GEORGIA CONSTITUTION.

A convicted Defendant must satisfy a two-prong test in order for the Court to uphold the validity of a claim addressing ineffective assistance of counsel *at trial*.

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland v. Washington, 466 U.S. 688, 687 (1984). "There is a strong presumption that the performance of trial counsel falls within the wide range of reasonable professional assistance. The reasonableness of the conduct is viewed at the time of trial and under the circumstances of the case," Williams v. State, 277 Ga. 853, 857, 596 S.E.2d 597, 602 (2004) (citation and punctuation omitted). If an appellant fails to meet his burden of proving either prong of the Strickland test, the reviewing court need not

examine the other prong. See Strickland, supra, 466 U.S. at 697; Fuller v. State, 277 Ga. 505, 591 S.E.2d 782 (2004).

As explained in Powell v. State, the Defendant's burden is significant:

To prove he has received ineffective assistance of counsel, the defendant must show both that counsel's performance was deficient and that this deficiency prejudiced the defense. Thus, counsel's performance will not be found to be deficient if it falls within the range of 'reasonably effective assistance'. The defendant must overcome the strong presumption that counsel's conduct falls within the broad range of reasonable professional conduct. As to deficient performance, errors in judgment and tactical errors do not constitute denial of effective assistance of counsel.

198 Ga. App. 509, 510, 402 S.E.2d 108, 109 (1991).

A new trial should not be granted on the basis of an ineffective assistance claim unless conduct by trial counsel so undermined the proper functioning of the adversarial process that the trial could not have produced a just result. Holland v. State, 250 Ga. App. 24, 25, 550 S.E.2d 433, 436 (2001). The Holland Court explained further:

Whether an attorney's trial tactics are reasonable 'is a question of law', not fact. The test for reasonable attorney performance has nothing to do with what the best lawyers would have done. Nor is the test even what most good lawyers would have done. We ask only whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial ... (W)e are not interested in grading lawyers' performances; we are interested in whether the adversarial process at trial, in fact, worked adequately.

In this case the defense intended to create a reasonable doubt as to Cannon's guilt by demonstrating to the jury that (1) there existed serious defects in the roadway where the accident occurred (2) that those defects rather than any alleged reckless driving were the proximate cause of the deaths in this case, and (3) that the police investigation in this case was inadequate. (MFNT 18-20).

In support of this strategy the defense retained Lieutenant Eric Naugle ("Naugle"). Naugle is an active duty Lieutenant with the Glynn County Police Department and a recognized expert in accident reconstruction (MFNT 33). Naugle has personally investigated hundreds of vehicular homicide cases, had over 1,000 hours of training in the field, and is certified as an Accident Reconstructionist (MFNT 32-35).

According to trial counsel, "the entire trial strategy was based on [Naugle's] testimony." (MFNT 18). However, the Court excluded Naugle's testimony in its entirety. (T 228). As the basis of this ruling the Court found that the defense had acted in bad faith.

Based on the evidence presented at the hearing on the Motion for New Trial it appears Naugle would have testified to the following:

Speed: Naugle intended to opine that Cannon's vehicle was travelling at approximately 54 miles per hour just prior to loss of control, and that it could not have been doing more than 62 miles per hour (MFNT 44, 47).

Defects in the Roadway: Naugle would have testified to specific defects in that portion of I-516 where this accident occurred. He would have also testified that in his expert opinion those roadway defects were the proximate cause of the deaths in this case (MFNT 64, 67). He claims that the defects in I-516 were well known to the State, as they were detailed in a Georgia Department of Transportation Audit Report.¹⁰ Specifically, Naugle would have testified that the defects in the roadway such as the polished surface and lack of drainage during rain lead to a lack of friction for vehicles that were traveling on the road (MFNT 67). Moreover, he would have testified concerning an inappropriately marked theoretical gore in the area where the defendant lost control of the vehicle. He opines that the condition of the gore allowed merging vehicles to cross into vehicles that were traveling on the main road. He also addressed a lack of barriers preventing vehicles from crossing the center divider (MFNT 67).

The police investigation: Naugle also intended to testify to deficiencies in the police investigation. In broad summary, this testimony would have highlighted mistakes, or omissions, made by the Major Accident Investigation Team ("MAIT") investigators. The Court notes that this would not have included the issues now known about Shadle's testimony.

This Court found that defense counsel violated the applicable discovery statute; and did so in bad faith resulting in exclusion of not only the speed calculations, but the

¹⁰ The Defense furnished the State with the DOT Audit Report which thoroughly explained all the defects in the roadway, including the issues with vehicles merging improperly across the theoretical gore, the clogged drainage structures that prevent water from draining off the roadway, that the surface of the road was "substantially worn" and appears to be "polished," that several accidents have occurred that have "launched vehicles into opposing lanes of traffic" and that there were no barriers in the median that prevented vehicles from going into the opposite lanes of traffic.

entirety of the expert witness's testimony. Moceri v. State, 338 Ga. App. 329, 340, 788 S.E.2d 899, 908 (2016). This was a drastic remedy imposed by the Court due to the defendant's prior violations of Court scheduling orders and late disclosure in this case. See, Brown v. State, 268 Ga. App. 24, 601 S.E.2d 405 (2004) (trial court should not exclude criminal defense's evidence for failure to comply with discovery rules unless the State shows that it was prejudiced by the failure and the defense acted in bad faith). However, the Court does not hold that a discovery violation is a *per se* deficiency as argued by the Defendant.¹¹ Thus, the Court must still evaluate the Defendant's claim of ineffective assistance under Strickland.

The Court finds that Trial Counsel's handling of the expert in this case was deficient. The deficiencies include counsel's failure to comply with existing orders, not preparing the case to allow Naugle's testimony, and allowing the expert to present his findings only after the State had rested. Given the critical nature of Naugle's testimony and the history of this case a reasonably effective trial lawyer would have taken proper steps to insure that Naugle was aware of the deadlines imposed by the Court and would have reviewed the amended findings in a timely manner. Even assuming that Trial Counsel believed that Naugle's updated calculations were not "significant", the Court is troubled by the casual approach used by counsel to address the expert's opinions. The record demonstrates that despite the critical nature of his testimony there was an apparent lack of attentiveness and urgency that was ultimately detrimental to the Defendant.

Further, a primary defense in this case was that defects in the roadway, rather than Cannon's driving, were the proximate cause of the deaths. Well in advance of trial Defense counsel had in her possession a DOT audit report that detailed multiple road defects associated with I-516 at the approximate location of the collision. Defendant argues that these defects alone, or in combination, could have been the proximate cause of the collision in this case. Among the defects addressed in the report were that vehicles routinely cross the theoretical gore area when merging onto I-516 from Veteran's Parkway and that the auxiliary lane is not long enough to facilitate a proper

¹¹ Defendant cites to Jones v. State, 292 Ga. 593, 740 S.E.2d 147 (2013) for the proposition that the exclusion of evidence for a discovery violation is *per se* ineffective assistance. However, the Court has reviewed the case and does not find any such holding.

merging of vehicles onto the road. These findings are significant in that Cannon's testimony was that he was trying to avoid an improperly merging vehicle when he lost control. The findings become much more critical when coupled with Shadle's actual statement to the police.

The report also concluded that many of the drainage structures were full of debris preventing water from flowing off the road, and that the roads were so slick that they were polished. Appellate Counsel argues that the potential for standing water along with the slickness of the road could have explained why Cannon lost control when he swerved to miss the merging vehicle. The report also notes that there is no barrier in the median and several crashes had occurred that had "launched" vehicles into opposing lanes of traffic.

Each of these defects, as known to the DOT, could have been used as evidence supporting Cannon's argument that the condition of the roadway, rather than his driving, was the proximate cause of this accident. Trial counsel apparently intended to introduce this evidence to the jury through Naugle. However, the report itself contained relevant evidence critical to the defense in this case. When Counsel learned of Naugle's exclusion she had a duty to properly present evidence of roadway defects and she was deficient in doing so. See, Gibson v. State, 280 Ga. App. 435, 436, 634 S.E.2d 204, 205 (2006)(trial counsel was found ineffective failing to secure a means to get evidence of design defects at an intersection before a jury); Dunagan v. State, 283 Ga. 501, 504, 661 S.E.2d 525, 528 (2008).

Having found that Cannon's counsel was deficient, the Court must now determine if the Defendant was prejudiced. The Court finds that but not for counsel's deficient performance there is a reasonable likelihood that the outcome of the trial would have been different. Counsel's deficiencies hit at the core of the Defendant's case. Unlike many other criminal charges, homicide by vehicle brings proximate cause into the jury's deliberations. Hartzler v. State, 332 Ga. App. 674, 677, 774 S.E.2d 738, 742 (2015).

If Naugle would have been allowed to testify he would have given his expert opinion that the speed of Cannon's vehicle just prior to the loss of control was approximately 54 miles per hour, and could not have possibly been doing more than 62

miles per hour (MFNT 44, 47). Such evidence is critical given the State's presentation of evidence by MAIT team investigators and a witnesses' general statements the Defendant was "driving at a high rate of speed." Given the speed limit was 55 miles per hour, evidence that the defendant was only driving 54 miles an hour could have convinced the jury that the defendant was not "driving at a high rate of speed."

Naugle's testimony was not limited to the speed of Cannon's vehicle. He would have also testified to known road defects and deficiencies in the State's investigation of the incident. For example, he would have testified to the issues presented to motorists while merging onto I-516 and the deficiencies in the theoretical gore and how the "polished surface" may have affected the vehicles involved.

Trial Counsel may have been able to address some of the issues through Officer Shook. At trial the Court found that portions of the audit report were not factually related to this particular crash, and thus, not relevant or probative. (TT, 131). The Court did allow Trial Counsel to ask questions about some matters contained in the report such as the "polished roadway", so that information was heard at trial. (TT, 130-140). The Court notes that the Defendant's trial counsel was not specifically prohibited from asking questions concerning the "gore" at the onramp to Interstate 516, merging traffic, or the lack of a median.¹² (TT, 131, 139, 234)

"When considering the prejudice prong for multiple claims of ineffective assistance of counsel, [the court] look[s] to whether 'the cumulative effect of counsel's [alleged] errors,' leads to a reasonable probability that the outcome of the trial would have been different," Schofield v. Holsey, 281 Ga. 809, 812, 642 S.E.2d 56 (2007). Here, the Court concludes that Trial Counsel was deficient in multiple ways, failing to properly present Naugle's testimony and findings and failing to properly present the

¹² Defendant has challenged the Court's ruling on Shook's testimony citing to Gibson v. State, 280 Ga. App. 435, 436, 634 S.E.2d 204, 205 (2006) where trial counsel failed to introduce into evidence government records indicating previous problems with the specific traffic signals at the specific intersection where the collision occurred. The Court's ruling in the case at bar with regard to Shook's testimony is consistent with Gibson in that the Court ruled that relevant facts could be inquired into by the Defense. Similarly, the Court's ruling is not contrary to Dunagan v State, 283 Ga 501, 505, 661 S.E.2d 525, 529 (2008) as the Court did not exclude testimony from Shook regarding the audit report, but rather limited the Defendant's questions to matters "relevant" to the collision which resulted in the Joyner's deaths.

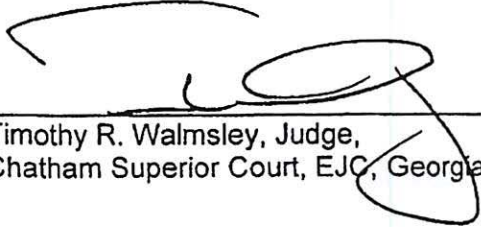
relevant portions of the DOT's audit report. Further, without Naugle's the Defendant could not also effectively impeach the police investigation of the accident.

As stated by the Supreme Court in Strickland, "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. 668 at 686(II). Here, the Court finds that counsel's conduct undermined the proper functioning of the adversarial process. In addition the Court finds that the State's suppression of Shadle's actual statement also undermined the fundamental fairness of Cannon's trial. When coupled together all of this leads the Court to conclude that the Defendant was prejudiced.

CONCLUSION

Based on the foregoing, Defendant's Motion for New Trial, as amended, is GRANTED.

SO ORDERED, this 12th day of December, 2016.



Timothy R. Walmsley, Judge,
Chatham Superior Court, EJC, Georgia

cc: Cynthia G. Morris, Esq.
Lyndsey Rudder, Asst. Dist. Atty.
Jennifer Guyer, Asst. Dist. Atty.
Stacey Goad, Esq.

FILED IN OPEN COURT
January 2nd, 2018
Jeremy A. North
Clerk S.C.C.C., GA

In the Superior Court of Chatham County
State of Georgia

State of Georgia *
*
v. * Case No. CR13-2235J2
*
Trevor Chase Cannon *

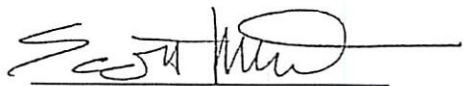
MOTION TO NOLLE PROSEQUI

Comes now the State of Georgia, by and through Scott Robichaux, Assistant District Attorney of the Eastern Judicial Circuit, and moves the Court to nolle prosequi the above case for the following reasons:

Although probable cause existed to arrest and indict the Defendant at the time, after reviewing the current evidence, the State believes there is an insufficient basis to convict the Defendant of the current charges, and respectfully requests this court to Nolle Prosequi the above-styled case.

THEREFORE, the State moves that the above case be nolle prosequi and closed without further prosecution.

This the 3rd day of January, 2018



Scott C. Robichaux
Assistant District Attorney
Eastern Judicial Circuit
State Bar Number 806198

133 MONTGOMERY STREET, SUITE 600
SAVANNAH, GEORGIA 31401
912/652-7308

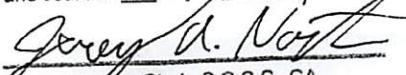
ORDER


The foregoing motion having been read and considered, it is hereby ordered that the above styled case be nolle prosequi.

SO ORDERED, this 3rd day of January, 2018

ENTERED  JAN 05 2018
CERTIFIED COPY

This document is a certified copy of the original document placed on record in the office of the Clerk of Superior Court, Chatham County, GA. Given under my hand and seal this 11th day of January 2018.


Jeremy A. North
Clerk S.C.C.C., GA


TIMOTHY R. WALMSLEY
JUDGE, CHATHAM COUNTY SUPERIOR COURT
EASTERN JUDICIAL CIRCUIT